RECORD AND BRIEFS

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IN THE
Supreme Court of the United States

STATE OF OHIO, ET AL.,

Petitioners,

v.

AMERICAN EXPRESS CO., ET AL,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* RETAIL LITIGATION CENTER, INC. IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... iv-vi

INTEREST OF AMICUS AND SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. THE DECISION OF THE COURT OF APPEALS MISCONSTRUES FEDERAL LAW ON A MATTER OF NATIONAL IMPORTANCE 3

A. Because Amex's Anti-Steering Rules Restrain Horizontal Price Competition Among *All* Credit Card Companies, This Case Affects Over 90% of Retail Transactions 4

B. Amex's Anti-Competitive Rules Increase Merchants' and Consumers' Costs in a $3 Trillion Sector of the Economy 10

II. THE COURT OF APPEALS' DECISION DISTORTS FUNDAMENTAL ANTITRUST PRINCIPLES AND HAS GRAVE IMPLICATIONS FOR "NEW ECONOMY" ENTERPRISES 14

A. The Second Circuit Distorted Antitrust Principles by Allowing Benefits to Cardholders to Immunize the Harms to Merchants 15

B. The Second Circuit's Decision Has Grave Implications for Antitrust Cases Against "New Economy" Companies 18

III. BECAUSE CREDIT CARD LITIGATION IS CONCENTRATED IN THE SECOND CIRCUIT, THIS COURT'S REVIEW IS NEEDED TO PREVENT THE COURT OF APPEALS' ERRONEOUS DECISION IN THIS CASE FROM EFFECTIVELY BECOMING LAW OF THE LAND 21

CONCLUSION..... 23

TABLE OF AUTHORITIES

Page(s)

CASES

Broad. Music, Inc. v. Columbia Broad. Sys., Inc.,
441 U.S. 1 (1979) 3

Cal. Dental Ass'n v. F.T.C.,
526 U.S. 756 (1999) 7

Copperweld Corp. v. Independence Tube Corp.,
467 U.S. 752 (1984) 3

Expressions Hair Design v. Schneiderman,
137 S. Ct. 1144 (2017) 6, 7

F.T.C. v. Ind. Fed'n of Dentists,
476 U.S. 447 (1986) 3

Ill. Tool Works Inc. v. Indep. Ink, Inc.,
547 U.S. 28 (2006) 3

In re Am. Express Anti-Steering Rules Antitrust Litig., MDL No. 2221,
764 F. Supp. 2d 1343 (J.P.M.L. 2011)..... 22

In re Payment Card Interchange Fee and Merch. Discount Antitrust Litig., MDL No. 1720,
2016 WL 6819020 (J.P.M.L. Oct. 3, 2016)..... 22

In re Payment Card Interchange Fee and Merch. Discount Antitrust Litig., MDL No. 1720,
398 F. Supp. 2d 1356 (J.P.M.L. 2005)..... 22

Leegin Creative Leather Prods., Inc. v. PSKS, Inc.,
551 U.S. 877 (2007) 5

Nat'l Broiler Mktg. Ass'n v. United States,
436 U.S. 816 (1978) 3

Nat'l Soc'y of Prof'l Eng'rs v. United States,
435 U.S. 679 (1978) 3, 13

NCAA v. Bd. of Regents of Univ. of Okla.,
468 U.S. 85 (1984) 13

Perma Life Mufflers, Inc. v. Int'l Parts Corp.,
392 U.S. 134 (1968) 3

Texaco Inc. v. Dagher,
547 U.S. 1 (2006) 3

Times-Picayune Publ'g Co. v. United States,
345 U.S. 594 (1953) 17, 19

United States v. Topco Assocs., Inc.,
405 U.S. 596 (1972) 16

OTHER AUTHORITIES

American Express Company, Annual Report (Form 10-K), at 3 (Feb. 17, 2017), *available at* http://www.snl.com/Cache/c38117384.html 9

James B. Stewart, May 5, 2016, *Facebook Has 50 Minutes of Your Time Each Day. It Wants More.* https://www.nytimes.com/2016/05/06/business/facebook-bends-the-rules-of-audience-engagement-to-its-advantage.html 20

Joseph W. Mead & Nicholas A. Fromherz, *Choosing A Court to Review the Executive*, 67 Admin. L. Rev. 1 (Winter 2015) 23

Nilson Report Issue 1103 (Feb. 2017), available at https://www.nilsonreport.com/publication_newsletter_archive_issue.php?issue=1103 10

INTEREST OF AMICUS AND SUMMARY OF ARGUMENT[1]

Amicus, the Retail Litigation Center, Inc., represents national and regional retailers. The RLC identifies and engages in legal proceedings that have a national impact upon the retail industry. The RLC's members employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues and to highlight the industry-wide consequences of significant pending cases. RLC's members include many of the country's largest and most innovative retailers, across a breadth of industries: Home Depot and Lowe's, Target and Walmart, Pepboys and AutoZone, as well as Whole Foods, Apple, Best Buy, and many more.

The RLC submits this *amicus* brief because retailers pay billions of dollars annually in fees to credit card companies—costs that raise retail prices for everyone. Though many RLC members compete

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[1] No counsel for a party authored this brief in whole or in part, and no party or entity, other than the RLC, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The undersigned counsel provided appropriate notice to all counsel of record of its intention to file an *amicus curiae* brief, in accordance with Supreme Court Rule 37(2)(a). The parties have filed blanket permissions to file amicus briefs.

with one another for customers, they are united here in the view that Amex's anti-steering rules inflict significant harm to their business and to the national economy.

Amex's rules protect it—and also protect Visa, Mastercard, and Discover—from having to compete for business from retailers. While credit card companies value merchant acceptance, Amex's rules ensure *no* credit card company competes to offer merchants lower prices. Why would they? Amex's anti-steering rules mean that merchants cannot avoid more expensive networks by shifting transactions to networks with lower merchant fees. As a result, the networks view lowering fees as "leaving money on the table," as one network testified. 206a. So it is little surprise that the rates merchants pay have only increased. This is no small problem: credit cards process over $3 trillion in annual spending, and the rules at issue impede competition in 90% of those transactions. And given the continuing rise in Internet sales and "mobile pay" apps, credit cards will process an ever larger portion of Americans' spending.

Antitrust law should care deeply about Amex's conduct. Indeed, in a 150-page opinion, the district court found that Amex's conduct violates the Sherman Act by suppressing horizontal price competition—and safeguarding such competition is the primary objective of antitrust law. The Second Circuit's reversal, on this important issue of federal law, warrants certiorari. Retailers ask this Court to grant review and reinstate the district court's injunction and the hope it offered of subjecting credit card processing fees to competition.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS MISCONSTRUES FEDERAL LAW ON A MATTER OF NATIONAL IMPORTANCE

If left to stand, the Second Circuit's opinion will constrain price competition in nearly every credit card transaction, harming merchants and consumers alike.

The importance of this federal question to the national economy warrants certiorari. *See* S. Ct. Rule 10(c). Particularly in cases involving Section 1 of the Sherman Act, this Court has long acknowledged that "the importance of [an] issue . . . for the administration of the antitrust laws" can be a sufficient reason to grant review, *Nat'l Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 820 (1978), and has repeatedly granted certiorari in important antitrust cases even in the absence of an inter-circuit conflict. *See, e.g.*, *Texaco Inc. v. Dagher*, 547 U.S. 1, 3 (2006); *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 33 (2006); *F.T.C. v. Ind. Fed'n of Dentists*, 476 U.S. 447, 453 (1986); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 8 (1979); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 681 (1978); *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 136 (1968), *overruled on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). Here, the sheer volume of consumer transactions affected—both in absolute terms and as a proportion of the national economy—warrants this Court's consideration of this case.

A. Because Amex's Anti-Steering Rules Restrain Horizontal Price Competition Among *All* Credit Card Companies, This Case Affects Over 90% of Retail Transactions

Amex's anti-steering rules harm merchants and consumers alike. As the district court found, many merchants, particularly the large and multi-location retailers that account for the bulk of credit card charge volume, cannot stop accepting Amex without losing an unacceptable portion of their sales. 70a-71a, 158-159a, 163a-165a, 168a-169a.

In a competitive market, those merchants could nonetheless pressure Amex to reduce its card acceptance charges by shifting transactions toward networks that offer lower pricing. But Amex's anti-steering rules, born in an attempt to increase their market share, prevent that. *See* 90a-94a (detailing history of anti-steering rules). Further, those rules obstruct Amex customers from deciding for themselves whether any promotion merchants would offer to encourage use of competitor cards outweighs the value of Amex's rewards. Consumers and merchants cannot decide what is in the "joint" economic interest. 81a. Instead, relying on its market power, Amex has decided that it is in its *own* economic interest to avoid any threat of price competition on the fees merchants pay and has successfully imposed rules vitiating that threat.

Worse, because Amex's rules bar merchants accepting Amex from offering incentives to steer customers from (or to) *any* credit card, they remove any incentive for Visa, Mastercard or Discover to

undercut Amex's price to obtain more transactions. As a result, Amex's rules also increase the costs those networks charge merchants. 70a-71a, 102a, 191a-192a, 194a-195a, 203a.

This is critical: although Amex's rules are *vertical* restraints because they govern Amex's relationship with its customers (the merchants), they restrain *horizontal* price competition, *i.e.* competition among credit card brands. This Court has recognized that protecting horizontal competition—competition between rivals—is "the primary purpose of the antitrust laws." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890 (2007). Yet as the district court found, horizontal interbrand competition "is frustrated to the point of near irrelevance in the network services market" because of the rules challenged here. 195a.

In a functioning competitive market, customers steer their business to lower priced alternatives; lower prices yield higher demand. When McDonald's lowers its Big Mac prices, more customers buy Big Macs and fewer buy Burger King's Whoppers. Downward pressure on pricing is common in the retail industry, where tight margins mean that retailers "promot[e] competition among multiple suppliers, often by rewarding competitive bidders with increased purchase volume." 216a.

That link between price and demand is essential to price competition. Indeed, Amex's witnesses admitted under oath that Amex "would face increased pressure to reduce its rates if merchants could shift share to a less expensive network." 218a. Discover admitted the same. 219a. In fact, the court of appeals acknowledged that Amex's rules "affect

competition," finding that the anti-steering rules "protect[] the critically important revenue that Amex receives from its relatively high merchant fees." 50a. But how Amex "protects" the revenue is by shielding the prices it charges merchants from inter-brand competition—precisely what antitrust law forbids.

In a world without anti-steering rules, Best Buy, for example, could negotiate with Discover for a reduced rate and then offer a designated checkout lane for Discover customers. 101a. Or Walmart could offer a discount on prescriptions to customers using a card with lower fees, thereby passing some of its cost savings to consumers. Each Amex customer could then decide whether the cardholder rewards Amex offers are worth waiting in the longer line or paying more for their medicine. Yet merchants are barred under Amex's rules from even making those offers. Similarly barred is any disclosure to customers comparing "the relative costs of acceptance across card brands." 101a. A retailer cannot even *inform* customers that Amex is costlier than Discover and let them do as they wish with that information.

In *Expressions Hair Design v. Schneiderman*, this Court examined a state law that barred merchants who wished "to discourage the use of credit cards" from surcharging credit card prices. 137 S. Ct. 1144, 1146 (2017). Finding that the surcharging ban regulated merchants' ability to communicate truthful pricing information to their customers, the Court held that First Amendment scrutiny was required. *Id.* at 1151. Amex's challenged rules similarly attempt to interfere with the sharing of truthful information between merchant and consumer.

Amex's rules, like the rules at issue in *Expressions*, exist to hide information from consumers. As a result, most customers never know that the Amex cards they carry raise prices for everyone—the predictable result of a restraint on horizontal competition. *See Cal. Dental Ass'n v. F.T.C.*, 526 U.S. 756, 784-85 (1999) (Breyer, J., concurring in part and dissenting in part) ("To restrain truthful advertising about lower prices is likely to restrict competition in respect to price—the central nervous system of the economy." (internal quotation marks omitted)).

Notably, the steering that merchants seek to do affects behavior only where "both the merchant-consumer and the cardholder-consumer derive a net benefit." 257a. The "economically rational consumer will not accept a merchant's invitation to use another card product unless he believes that what the merchant is offering is of greater value than the rewards or other benefits he receives for using his Amex card." *Id.* The anti-steering rules exist to *prevent* merchants and consumers from determining, on the basis of complete and accurate information, whether there is a "net benefit" to using an Amex.

Because merchants cannot influence cardholders' choice of card to use, when "faced with a price increase," merchants' "recourse . . . is an 'all-or-nothing' acceptance decision." 159a-160a. This is no choice at all. "Nothing," *i.e.* dropping Amex altogether, is "commercially impractical." 159a. Amex accounts for 26% of charging volume, so no major retailer can afford to refuse to accept Amex. 155a, 159a n.27. Even the largest merchants—including RLC's members—"are not immune" to this

"all-or-nothing" bind. The evidence bears this out: When Walgreens—then the nation's ninth largest retailer—attempted to combat Amex's rising rates by dropping Amex, it was soon forced by lost sales to reaccept the card on the same terms it had earlier refused. 163a-164a.

In addition to removing any incentives for incumbent networks to compete on the prices they charge for card acceptance, Amex's anti-steering provisions also "render it nearly impossible for a firm to enter the relevant market by offering merchants a low-cost alternative." 203a. Again, this is not merely theoretical. Discover originally attempted to enter the network services market as a "low price" alternative to the big three credit card companies. But it soon learned that anti-steering rules made competing on price irrelevant. Because it could not attract additional business by offering low prices, Discover realized it was "leaving money on the table" by not raising prices. 206a. So it did. It raised its rate 24% between 2000 and 2007—with "virtual impunity"—and its rates are now similar to Visa's and Mastercard's. 206a; 210a.

Though Visa and Mastercard settled this case and agreed to remove their equivalent anti-steering rules, no Amex-accepting merchant can "offer a discount to MasterCard cardholders if they use a Visa card instead." 102a; 180a ("Amex has been able to perpetuate [rules prohibiting steering] even after Visa and MasterCard abandoned their anti-steering rules as a result of this litigation"). Because every

major retailer—more than 90% by volume[2]—accepts Amex, the rules challenged here not only insulate Amex from competition, but effectively suppress competition among *all* credit card companies. As the district court found, "[e]ach of the credit card networks is largely insulated from the downward pricing pressure ordinarily present in competitive markets." 197a.

This results "in higher prices for merchants," as the district court found (a finding left undisturbed by the court of appeals). 192a; 49a-51a. In turn, "inflated merchant discount rates are passed on to all customers"—"in the form of higher retail prices." 192a; 193a. Amex said this well, in an *amicus* brief filed in a challenge to Visa's anti-competitive practices: "Decreased competition in the sale of an input or intermediate good, such as network services,

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[2] Two-thirds of credit card-accepting merchants, by raw number, accept Amex. 17a, 46a. But that understates the case because every major retailer—from 7-Eleven, to Apple, to Target, as well as every major supermarket chain and department store—accepts Amex. It is the "very small merchants," those with under $50,000 in annual volume—smaller than your local florist—who may not accept Amex. 224a & n. 48. In considering the market effects on Amex's anti-steering rules, the more appropriate analysis requires weighting the number of merchants by charge volume. By that measure, the force of Amex's anti-steering rules is laid bare: over 90% of merchants, by card volume, accept Amex. *See* American Express Company, Annual Report (Form 10-K), at 3 (Feb. 17, 2017), *available at* http://www.snl.com/Cache/c38117384.html.

is harmful to consumers no matter how competitive the downstream market may be." 239a-240a n.55.

Competition in the credit card industry is limited to attracting cardholders, with no competition for the costs merchants pay and pass on to the retail economy. Amex, Visa, and Mastercard "fiercely compete to acquire new cardholders," while insulating themselves from competition for merchant acceptance. 238a.

Accordingly, the challenged rule not only affects the 26.4% of purchases (by dollar amount) made using an Amex, 151a—but, in fact, affects the more than 90% of retailers (by charge volume) that accept Amex. This case thus warrants certiorari because it concerns nearly every dollar that Americans spend using a credit card as well as retail prices throughout the economy, regardless of the form of payment used by the consumer at check-out.

B. Amex's Anti-Competitive Rules Increase Merchants' and Consumers' Costs in a $3 Trillion Sector of the Economy

The four dominant credit networks collectively processed over $3 trillion in purchases last year.[3] That figure reflects a dramatic 25% increase from the $2.4 trillion in purchases just three years ago, as the rise of Internet sales has marginalized cash. 74a.

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[3] *See* Nilson Report Issue 1103 (Feb. 2017), *available at* https://www.nilsonreport.com/publication_newsletter_archive_issue.php?issue=1103.

The networks charged merchants tens of billions of dollars in fees on those transactions. "The costs associated with accepting credit and charge cards are among many merchants' highest," as the district court found after extensive testimony. 221a-222a. Merchants pay billions of dollars in fees each year to accept credit cards. An airline testified that its credit card costs were *twice* as much as its domestic labor costs. 222a. Ikea testified that the only costs that exceed credit card costs are labor, advertising, and rent. 222a. These higher costs are reflected in the "higher retail prices" consumers then pay. 192a; 193a.

And these substantial fees are rising. The district court found Visa and Mastercard were able to increase merchant rates by more than 20% from 1997 to 2009—without fear of other networks undercutting them on price. 210a. Amex too raised its discount rate for millions of merchants twenty separate times over a five year period, for a total of $1.3 billion in incremental income. 170a; 208a. As described above, Discover has likewise raised its fees, after anti-steering rules doomed its efforts to gain market share by competing on price.

The Second Circuit pointed to increased charge volume to claim it evidences competition, but the increased volume provides further evidence of Amex's antitrust violation. 52a. Charge volume is certainly increasing, as more transactions occur in settings where credit cards supplant cash, such as Internet shopping or using "mobile pay" apps. But in a competitive market, merchants' prices would decline *on a per-transaction basis* as volume increases; that merchants' prices have nonetheless

steadily increased indicates that competition is being suppressed. Moreover, it would be particularly wrong to infer price competition from customers' expanded charge volume because Amex's anti-steering rules ensure that a cardholder's decision to use an Amex card cannot be based on whether it charges merchants a competitive price. 195a-196a. Cardholders are ignorant of the cost merchants pay to accept Amex, so they have no incentive to use their Amex cards less.

Consumers are also harmed by these rules. Cardholders are deprived of the right, as economic actors, to decide for themselves whether the benefit of rewards is worth increased prices. And all consumers pay higher retail prices. 68a, 127a, 210a-212a. Worse, only certain customers receive cardholder benefits in return for those higher prices at checkout. Many others receive nothing: "a lower income shopper who pays his or her groceries with cash or through [food stamps]... is subsidizing, for example, the cost of the premium rewards conferred by American Express on its relatively small, affluent cardholder base." 211a-212a.

Nor is there evidence that removing these anticompetitive restraints would harm consumers or destroy Amex's business. The district court found that Amex's "dire prediction of how business will be impacted" by removing the anti-steering rules is "not supported" by the evidence—even after seven weeks of testimony. 241a. Amex had every opportunity to put on its case, but it could find no such evidence. No "expert testimony." No "financial analysis." No direct evidence at all that Amex will be "unable to

adapt its business to a more competitive market." 242a.

In reality, Amex's warnings thinly repackage long-failed arguments that price competition cannot be tolerated in one segment of the economy or another. This Court has repeatedly rejected such claims of "ruinous competition" as a matter of law, and history has not born them out as a matter of fact:

> The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services.... The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.

Nat'l Soc'y of Prof'l Eng'rs, 435 U.S. at 695; *see also NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 116-17 (1984). In other words, we trust competition—not its suppression—to allocate benefits in the economy.

More likely, if the district court's ruling were restored, price competition would force Amex to provide *more* value to consumers to "increase cardholders insistence" on using their Amex cards and willingness to decline merchants' invitations to use a lower cost card. 245a. Indeed, RLC's members recognize and understand that their customers—including Amex cardholders—may prefer one form of payment for reasons personal to them, such as consolidating business spending, tracking their personal spending budget, or maximizing rewards. Accordingly, as they do with all customer interactions, RLC members will carefully analyze expected cardholder responses in deciding "whether and how much to steer." 247a.

The district court's injunction would inject much-needed price competition to curb ever-escalating card acceptance costs, to the benefit of the entire retail economy.

II. THE COURT OF APPEALS' DECISION DISTORTS FUNDAMENTAL ANTITRUST PRINCIPLES AND HAS GRAVE IMPLICATIONS FOR "NEW ECONOMY" ENTERPRISES

The Court of Appeals did not disturb the district court's copious factual findings that Amex used its anti-steering rules to impede merchants' ability to foster competition, resulting in higher prices on merchants and consumers alike. Yet the panel found that the government failed to prove "net harm . . . to both cardholders and merchants." 54a. At points the decision implied that the burden on the government was higher still: "Plaintiffs' initial burden was to

show that the [anti-steering rules] made *all* Amex consumers on both sides of the platform—i.e., both merchants and cardholders—worse off overall." 51a (emphasis added).

That Amex operates a "two-sided" platform is not unprecedented or even unusual: many businesses, from legacy companies like newspapers and television markets, to newer companies like Google, Facebook, Uber, and Airbnb, have two interdependent customer bases. Yet this Court has never given a dominant actor carte blanche to extract supra-competitive pricing from one group of consumers so long as another group benefits. That error itself would warrant certiorari, but it is compounded by the additional holding that—to make even a *prima facia* case—a Rule of Reason plaintiff must affirmatively foreclose the possibility that benefits enjoyed by some consumers outweigh the supra-competitive prices imposed on others.

A. The Second Circuit Distorted Antitrust Principles by Allowing Benefits to Cardholders to Immunize the Harms to Merchants

The decision of the court of appeals conflicts with fundamental antitrust principles. Never has this Court upheld a rule that is explicitly designed to suppress horizontal price competition in services offered to some consumers —and, in fact, successfully suppresses that competition—on the basis that less competition makes it easier for a business to finance its efforts to attract a different set of customers. In fact, antitrust law establishes the opposite. As this Court has recognized, given courts' "inability to

weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector," antitrust law scorns "the notion that naked restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to increase competition." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609-10 (1972).

The Sherman Act does not trust private actors—any more than courts—to decide whether horizontal price competition must suffer in one area so that another can allegedly benefit. "[T]he freedom to compete . . . cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy." *Id.* at 610.[4]

This Court recognized as much long ago, in evaluating a competitive restraint affecting another two-sided platform—newspapers. Newspapers must have advertisers and readers, but "dominance in the advertising market, *not in readership*, must be *decisive* in gauging the legality" of a restraint affecting competition for advertisers. *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594,

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[4] To be sure, *Topco* involved a horizontal conspiracy. 405 U.S. at 608. But its refusal to allow the relative societal value of competition in different sectors to be decided by private contract applies with no less force here, where a vertical restraint has eliminated horizontal interbrand price competition as effectively as an agreement between rivals.

610 (1953) (emphasis added). Nowhere in *Times-Picayune* did this Court suggest that the government's proof might fail at the first stage of the Rule of Reason because it did not balance the effect of the challenged restraint on advertisers against the supposed benefits to readers.

In sum, antitrust law does not entertain the rob-Peter-to-pay-Paul inquiry embraced by the Second Circuit. It does not tolerate contractual rules that restrain competition on the theory that the inflated prices paid by some consumers are used to fund products that others will find more attractive.

Yet that was precisely the rationale upon which the Second Circuit rested its decision to reverse the district court, without even remanding to allow the government the opportunity to satisfy its newfangled revision of Rule of Reason test. The Second Circuit's opinion thus conflicts with fundamental antitrust principles: it requires merchants (and all their customers) to bear inflated pricing caused by rules protecting all networks from price competition, so that cardholders can enjoy rewards. It blessed the inflated prices that admittedly result from anti-steering rules even though Amex *admitted* that it pockets a portion of the "gains from increased merchant fees" and does not pass them "along to cardholders in the form of rewards." 51a; *see also* 290a (Amex's anticompetitive pricing "resulted in a higher net price" to consumers and merchants). Antitrust law does not allow Amex to decide—on behalf of all Americans—that price competition for merchant fees would represent too great a threat to its efforts to compete for cardholders.

The Second Circuit's approach also sets an unworkable framework. The harm to consumers here includes being deprived of the right to learn of the costs of Amex acceptance and use a different card instead. Consumers are thus actively impeded from balancing the value of rewards against higher prices at checkout—making it nigh impossible to quantify the supposed net procompetitive benefits the court of appeals surmised into existence. It is futile to search for some workable common denominator that could convert the harm to merchants, the alleged benefits to cardholders, and the higher prices paid by all retail customers into one net value for our economy, be it negative or positive. As the district court found, Amex was not able to credibly do that at trial. 182a-184a. It prevailed on appeal only because the circuit court shifted the burden of that standard-less inquiry to the government.

B. The Second Circuit's Decision Has Grave Implications for Antitrust Cases Against "New Economy" Companies

Given the size and the significance of payment card transactions to our economy, this case would warrant certiorari even if its effects stopped there. If left to stand, however, the decision of the court of appeals threatens to derail antitrust jurisprudence across broad swaths of the economy. Like credit card networks, many "new economy" companies are platforms that seek to attract two sets of interdependent customers. Google and Facebook, for example, must attract users and advertisers. Uber

needs to attract drivers and customers. Airbnb has to attract hosts and guests.

The business models of Google and Facebook are analogous to the model long used by newspapers, where payments from advertisers fund services for users. Like the Times-Picayune, Google and Facebook see both users/readers and advertisers as their customers. By the court of appeals' reasoning, those companies could impose anti-competitive rules on advertisers so long as those rules funded improved services for users. Take, for example, a contract term requiring Facebook advertisers to advertise only on Facebook and not on the site of any Facebook competitor (Twitter, Instagram, etc.). This vertical restraint would be subject to the Rule of Reason. But even if the government adduced ample evidence that competition was being squelched and innovative start-ups were failing because they were starved of advertising dollars, the Second Circuit's standard would permit the restraint unless the government could also prove that Facebook's rule harmed users. Facebook's anti-competitive rule would evade all scrutiny, and it would have no burden to prove anything. And, indeed, because companies like Facebook and Google are so essential to advertisers—far more than the city newspaper in *Times-Picayune*—the court of appeals' decision threatens acute harm to competition among Internet-based companies. The potential of new economy companies to create ever larger and more indispensable two-sided platforms makes ensuring that those frameworks cannot evade antitrust scrutiny more important than ever.

Moreover, to the extent the Second Circuit's decision relied on the "chicken and egg" problem in the credit card industry—where network effects create barriers to entry—the decision has implications for many "sharing economy" businesses. 17a-18a; *see also* 154a. Companies like Uber and Airbnb also face a "chicken and egg" problem: potential ride-share drivers will not sign up unless they will find riders, and riders will not sign up for an app unless it is likely there will be an available driver. The same is true of Airbnb hosts and guests. 17a. Will these companies rely on the Second Circuit's opinion to evade antitrust challenges?

Finally, the Second Circuit's erroneous determination that "[c]ardholder insistence" is irrelevant to a "finding of market power" also has grave antitrust implications. Facebook, another two-sided platform, has profited because of its customers' "insistence" on using the social media website to communicate with friends, with some reports indicating that its users spend nearly an hour daily on the site.[5] Google, too, has a large volume of loyal customers who perform dozens of web searches daily on its platform. Because of that customer "insistence," Facebook and Google have significant market power in the other part of their

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[5] James B. Stewart, May 5, 2016, *Facebook Has 50 Minutes of Your Time Each Day. It Wants More, available at*
https://www.nytimes.com/2016/05/06/business/facebook-bends-the-rules-of-audience-engagement-to-its-advantage.html.

two-sided platforms, *i.e.* in negotiating with advertisers. To discount that power, even in the face of supra-competitive effects, simply because it results from "customer loyalty" has no basis in antitrust jurisprudence. Indeed, in traditional markets, market power *often* results from a company's ability to "attract customer loyalty"—take, for example, Coca-Cola's market power, which stems from customers preferring its product to competitors like RC Cola.[6] And, as detailed above, Amex cardholders are loyal, in part, because they are deprived of the opportunity to choose whether to accept a merchant's offer to forego their Amex cards.

Because the Second Circuit's decision contravenes longstanding antitrust jurisprudence, certiorari is warranted.

III. BECAUSE CREDIT CARD LITIGATION IS CONCENTRATED IN THE SECOND CIRCUIT, THIS COURT'S REVIEW IS NEEDED TO PREVENT THE COURT OF APPEALS' ERRONEOUS DECISION IN THIS CASE FROM EFFECTIVELY BECOMING LAW OF THE LAND

Under the rules governing multidistrict litigation (MDL), credit card antitrust litigation has been clustered in the Second Circuit. As a result, future merchant challenges to Amex's credit card pricing

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[6] That customer preference can cause market power is not unlawful or even disfavored. The key point here is that even lawfully acquired market power can be unlawfully abused through subsequent, anticompetitive conduct.

would likely be venued in the Second Circuit. Because it is unlikely any other Circuit will have the opportunity to weigh in on the legality of Amex's anti-steering rules, certiorari should be granted. Without this Court's review, the court of appeals' erroneous decision could effectively become the law of the land and bind merchants in every state.

Because of MDL transfers, virtually all antitrust litigation against the major credit card networks is pending in courts within the Second Circuit. Other than cases brought by the United States, which are not subject to MDL procedures, individual and class action antitrust challenges to Amex's merchant restrictions are collected in MDL 2221, pending before the Eastern District of New York.[7] Similarly, the initial transfer order in MDL 1720 collected 14 antitrust actions against Visa and Mastercard in the Eastern District of New York; as of late last fall, that proceeding encompassed over 90 such actions.[8] Any future merchant anti-trust challenges to credit cards' anticompetitive practices will almost certainly be venued in the Second Circuit.

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[7] *In re Am. Express Anti-Steering Rules Antitrust Litig.*, MDL No. 2221, 764 F. Supp. 2d 1343 (J.P.M.L. 2011); *see also In re Am. Express Anti-Steering Rules Antitrust Litig.*, MDL No. 2221, ECF No. 57 (E.D.N.Y. Nov. 5, 2015) (order appointing counsel, noting pendency of multiple class actions).

[8] *In re Payment Card Interchange Fee and Merch. Discount Antitrust Litig.*, MDL No. 1720, 398 F. Supp. 2d 1356 (J.P.M.L. 2005); *id.*, 2016 WL 6819020 (J.P.M.L. Oct. 3, 2016).

Commentators have noted the potential risks of concentrating important legal questions in a single court, without the "opportunities for dialogue" among the courts of appeals that "can serve to tease out nuance that might otherwise go undetected." Joseph W. Mead & Nicholas A. Fromherz, *Choosing A Court to Review the Executive*, 67 Admin. L. Rev. 1, 33 (Winter 2015). Protecting against that risk militates further in favor of this Court's review, particularly given the importance of the federal question at issue and the impact on the national economy.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioners' petition for a writ of *certiorari*.

Respectfully submitted,

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